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EVENT TICKETS CENTER, INC.

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA**

KRISTINA HERNANDEZ, individually and  
on behalf of all others similarly situated,

Plaintiff,

v.

EVENT TICKETS CENTER, INC.,

Defendant.

Case No. 2:24-cv-01983-DAD-AC

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEFENDANT'S MOTION TO DISMISS  
PURSUANT TO FEDERAL RULES OF  
CIVIL PROCEDURE 12(b)(3) AND 12  
(b)(6).**

Date: November 19, 2024

Time: 1:30 p.m.

Judge: Hon. Dale A. Drozd

Court: 4

1 Pursuant to Federal Rules of Civil Procedure 12 (b)(3) and 12(b)(6), Defendant EVENT  
2 TICKETS CENTER, INC., (“Defendant”) respectfully moves this Court to dismiss Plaintiff,  
3 KRISTINA HERNANDEZ’S (“Plaintiff” or “Hernandez”) Complaint because this Court lacks  
4 jurisdiction to hear this case due to another case pending in the Northern District containing  
5 substantially similar claims and parties, and because Plaintiff fails to state a claim upon which relief  
6 can be granted due to a prior duplicative action alleging nearly identical causes of action.

## 7 I. INTRODUCTION

8 Hernandez filed her Complaint on July 19, 2024, in the United States District Court Eastern  
9 District of California against Defendant alleging various causes of action, including claims for  
10 **Violation of California’s False Advertising Law, Violation of California’s Consumer Legal**  
11 **Remedies Act, Unfair Competition Law, and Quasi-Contract.** Ten days prior to Plaintiff filing  
12 her Complaint against Defendant, an individual, Mikhail Gershzon (“Gershzon”), filed a separate  
13 Complaint against Defendant for nearly identical causes of action, and substantially similar claims  
14 with respect to Defendant’s advertising practices for their online ticket sales and pricing of those  
15 online tickets.

16 Defendant files this Motion to Dismiss on the grounds of the long-recognized “first-to-file”  
17 rule in efforts to curb multiple plaintiffs from filing substantially similar lawsuits against the same  
18 Defendant and Defendant having to Defend multiple cases in different courts. While it is true  
19 Gershzon focuses beyond issues concerning the imposition of fees, which is the primary focus of  
20 Hernandez, it nevertheless does make claims concerning fees, and any relief sought in Hernandez  
21 could be obtained in Gershzon as the Gershzon Complaint is currently framed. Because of the  
22 substantial similarity in Hernandez and Gershzon’s claims, and to avoid running the risk of judicial  
23 competition and conflicting rulings in cases, Hernandez’s Complaint (which was filed after  
24 Gershzon’s Complaint) should be dismissed in its entirety, or alternatively, stayed pending the  
25 resolution of the *Gershzon* matter.

26 ///

27 ///

## II. RELEVANT FACTS

### A. Gershzon Action

Mikhail Gershzon is a citizen of California and a resident of the city of San Francisco who has a pending putative consumer class action against Defendant alleging various causes of action relating to consumer protection laws. Gershzon's Complaint contains a nationwide putative class and a putative subclass of California consumers. (Request For Judicial Notice "RJN"; Exhibit B; *Gershzon Complaint* ¶ 47.)

Gershzon purchased tickets to a concert on Defendant's website on April 2, 2023. On July 9, 2024, ten days prior to Plaintiff filing her Complaint against Defendant. Gershzon's Complaint, filed in the Northern District of California, Case No. 3:24-cv-04142-AGT, alleges various causes of action including **Violation of Consumers Legal Remedies Act, Violation of Unfair Competition Law, Violation of False Advertising Law, Violation of the Ticket Resale Law, Breach of Warranty, and Unjust Enrichment.** (RJN: Ex. B; *Gershzon Complaint*)

On September 30, 2024, Defendant filed its Answer to the Gershzon complaint with the Northern District of California. (RJN: Ex. D)

### B. Hernandez Action

Plaintiff, Kristina Hernandez, is also a citizen of the State of California and a resident of the city of Citrus Heights, California located in the County of Sacramento. (RJN: Ex. A) On April 19, 2022, Hernandez purchased tickets to a concert from Defendant's website. (*Hernandez Complaint* ¶ 32.)

On July 19, 2024, Hernandez, through her counsel of record, Simon Franzini of Dovel & Luner, LLP, filed her Complaint against Defendant in the United States District Court for the Eastern District of California alleging various causes of action including **Violation of California's False Advertising Law, Violation of California's Consumer Legal Remedies Act, Unfair Competition Law, and Quasi-Contract.** (RJN: Ex. A)

On September 9, 2024, Defendant's counsel of record, Peter Maretz of Stokes Wagner, ALC, met and conferred with Hernandez's counsel, Simon Franzini, regarding this Motion to

Dismiss. Specifically, Defendant provided Hernandez’s counsel a copy of the Gershzon Complaint to review and requested Hernandez stipulate to dismiss or stay the matter pending resolution of the Gershzon matter under the “first-to-file” rule. (Ex. C)

On September 26, 2024, Plaintiff’s counsel responded stating that the two cases are different with “different claims on different facts” and they would not stipulate to dismiss or stay the *Hernandez* action. Thus, Defendant is forced with filing this Motion to Dismiss. (Ex. C)

It is Defendant’s position that the Hernandez and Gershzon claims are substantially similar in nature and in fact, Gershzon’s Complaint (which was filed before Hernandez’s Complaint) is broader and more inclusive of the alleged putative class claims. Both Complaints allege putative class actions, and both involve substantially similar facts regarding Plaintiff’s purchase of online concert tickets from Defendant’s website. Because Gershzon’s litigation commenced before this action, involve substantially similar facts, claims, and defenses, litigating both claims may cause substantial risk of inconsistent judgments and judicial interference between both District Courts.

### III. LEGAL AUTHORITY

The first-to-file rule requires that this matter be dismissed because Gershzon’s Complaint was filed against Defendant ten days *before* Plaintiff filed this action. Gershzon filed in the Northern District of California, and Plaintiff filed in the Eastern District of California.

The first-to-file rule was developed to “serve the purpose of promoting efficiency well and should not be disregarded lightly.” *Church of Scientology v. United States Dep’t of the Army*, (9<sup>th</sup> Cir. 1979). 611 F.2d 738, 750. It may be invoked “when a complaint involving the same parties and issues has already been filed in another district.” *Pacesetter Systems, Inc. v. Medtronic, Inc.*, (9<sup>th</sup> Cir. 1982). 678 F.2d 93, 95.

When the first-to-file rule is invoked, the court may exercise its discretion to stay the suit before it or may enjoin the parties from proceeding in the other suit. *Smith v. SEC* (6<sup>th</sup> Cir. 1997) 129 F. 3d 356, 361. However, Courts generally proceed under the rule that the entire action should be decided by the court in which an action was first filed, which in this case would be the *Gershzon* matter filed in the Northern District of California. *Id.*

1 The first-to-file rule is a doctrine of comity, which requires that the action should be decided  
2 by the court in which the action was first filed. *Smith v. SEC*, 129 F.3d at 361. Courts consider three  
3 factors in determining whether to defer to another court where a similar action is pending:  
4 **chronology of the lawsuits, identity of the parties, and identity of the issues.** See, e.g., *Alltrade,*  
5 *Inc. v. Uniweld Products, Inc.*, (9th Cir. 1991) 946 F. 2d 622, 625. “The [first-to-file] rule does not  
6 . . . require that cases be identical. The crucial inquiry is one of ‘substantial overlap.’ ” *Save Power*  
7 *Ltd. v. Syntec Finance Corp.*, (5th Cir. 1997).121 F.3d 947, 950.

#### 8 IV. ARGUMENT

9 In this case, it is clear all three factors are met: chronology of the lawsuits, identity of the  
10 parties, and identity of the issues which warrant dismissal of Plaintiff’s Complaint, or alternatively,  
11 warrant a stay of Plaintiff’s claim pending resolution in *Gershzon*.

##### 12 A. *Gershzon Filed His Complaint Before Hernandez*

13 The first factor simply requires that the case in question be filed later in time than the  
14 comparator case. *Variscite, Inc. v. City of Los Angeles* (C.D. Cal., Apr. 11, 2023, No. 2:22-CV-  
15 08685-SPG-SK) 2023 WL 3493557 (citing *Kohn Law Group. Inc.*, 787 F.3d at 1240 upholding the  
16 district court’s decision of granting motion to stay in favor of Defendant because Defendant filed  
17 an interpleader action in Mississippi ten months before Plaintiff filed its Complaint against  
18 Defendant in California.) Similarly, *Gershzon* filed his Complaint against Defendant on July 9,  
19 2024, ten days before Plaintiff filed this action on July 19, 2024. Thus, because Hernandez filed  
20 after Gershzon this first factor is satisfied and favors dismissal.

##### 21 B. *Identity of Parties in Gershzon and Hernandez Are Substantially Similar*

22 Courts in the Ninth Circuit have adopted a flexible approach in evaluating the similarity of  
23 the parties.” Id. at 11 (quoting *PETA, Inc. v. Beyond the Frame, Ltd.* (C.D. Cal., Feb. 16, 2011, No.  
24 CV 10-07576 MMM SSX) 2011 WL 686158 The first-to-file rule does not require identical parties  
25 or issues, so long as the actions are substantially similar or involve substantial overlap. *PETA, Inc.*  
26 *v. Beyond the Frame, Ltd.* at 2. Courts have found parties to be “substantially similar” under the  
27 first-to-file rule “if they represent the same interests.” *Variscite, Inc. v. City of Los Angeles* (C.D.

1 Cal., Apr. 11, 2023, No. 2:22-CV-08685-SPG-SK) 2023 WL 3493557.

2 First, exact identity is not required to satisfy the first-to-file rule. The rule is satisfied if  
3 *some* of the parties in one matter are also in the other matter. *Variscite, Inc. v. City of Los Angeles*  
4 at 11). Defendant, Event Tickets Center, is named in both *Hernandez* and *Gershzon* matters. The  
5 inquiry will be finding substantial similarity between the individual plaintiffs *Hernandez* and  
6 *Gershzon* and recognizing that both represent substantially similar interests.

7 Here, Gershzon purports to represent the interests of the Nationwide Class as follows:

8 *“All residents of the United States who, within the*  
9 *applicable statutes of limitation periods, made a purchase from*  
10 *Defendant’s websites for purposes other than resale.”*

11 Gershzon purports to represent the interest of the putative California Subclass defined as  
12 follows:

13 *“All residents of California, who, within four years prior to*  
14 *the filing of this Complaint, made a purchase from Defendant’s*  
15 *websites for purposes other than resale.”*

16 Similarly, Hernandez purports to represent the interest of the putative class defined as  
17 follows:

18 *“All persons who, while in the state of California and within*  
19 *the applicable statute of limitations and before March 1, 2024,*  
20 *purchased tickets from [www.eventticketscenter.com](http://www.eventticketscenter.com) (the “Class”).”*

21  
22 Gershzon filed his Complaint on July 9, 2024, and the putative class period runs from July  
23 9, 2020, to July 9, 2024. Hernandez was a resident of the state of California between July 9, 2020,  
24 and July 9, 2024. She purchased her concert tickets, while in California, from Defendant’s website  
25 on April 9, 2022, which falls *within* the class period of *Gershzon*, making Hernandez a member of  
26 *Gershzon’s* purported California subclass. Thus, both parties’ purported putative classes  
27 demonstrate they both represent substantially similar interests.

Furthermore, both Hernandez and Gershzon were consumers of Defendant's online ticket resale marketplace. Both plaintiffs were "buyers" of concert tickets alleging misrepresentations in the marketing of the tickets sold to them, and misrepresentations as to the fees and overall ticket prices. Hernandez and Gershzon both set forth allegations of misrepresentations in the marketing of online tickets, including alleged misrepresentations of ticket pricing and fees. Although Hernandez and Gershzon's identities are not identical (which is not required), based on the purported class interest they seek to represent, the nature of their claims, and the overlap of the purported class members, there is substantial similarity between *Hernandez* and *Gershzon* to satisfy this factor of the first-to-file rule. Thus, this factor weighs in favor of Defendant.

***C. Gershzon and Hernandez Contain Substantially Similar Issues***

This factor also weighs in favor of Defendant's Motion to Dismiss. Courts have held if the two cases overlap on substantive issues, the cases would be required to be consolidated in the jurisdiction first seized of the issues – in this case the Northern District where the *Gershzon* action was filed. *Save Power Ltd.* 121 F.3d at 951.

*Gershzon*, the earlier filed action, alleges putative class action claims substantially similar to the *Hernandez* claims. As mentioned above, the putative class in *Gershzon* is broader than the putative class in *Hernandez*, and nearly 100% inclusive of the putative class in *Hernandez* because Hernandez herself is a member of *Gershzon*'s purported putative class. *Gershzon* contains both a putative nationwide class and a California Subclass, while *Hernandez* only purports to represent a California class. Moreover, *Gershzon*'s causes of action almost entirely overlap with *Hernandez*'s claims. Each of their class claims respectively are as follows:

<b><i>Gershzon</i> Claims</b>	<b><i>Hernandez</i> Claims</b>
Violation of California's Consumer Legal Remedies Act (Cal. Civ. Code §§ 1750, <i>et seq.</i> ) ( <i>Gershzon</i> Complaint – Pg. 11)	Violation of California's Consumer Legal Remedies Act (Cal. Civ. Code §§ 1750, <i>et seq.</i> ) ( <i>Hernandez</i> Complaint – Pg. 13)
Violation of California's Unfair Competition Law (Cal. Bus. & Prof. Code §§ 17200, <i>et seq.</i> ) ( <i>Gershzon</i> Complaint – Pg. 13)	Violation of California's Unfair Competition Law (Cal. Bus. & Prof. Code §§ 17200, <i>et seq.</i> ) ( <i>Hernandez</i> Complaint Pg. 15)

Violation of California's False Advertising Law Cal. (Bus. & Prof. Code §§ 17500, <i>et seq</i> ) ( <i>Gershzon</i> Complaint – Pg. 15)	Violation of California's False Advertising Law (Bus. & Prof. Code §§ 17500, <i>et seq</i> ) ( <i>Hernandez</i> Complaint – Pg. 12)
Violation of California's Ticket Resale Law (Bus. & Prof. Code §§ 22500, <i>et seq</i> ) ( <i>Gershzon</i> Complaint – Pg. 16)	Quasi-Contract ( <i>Hernandez</i> Complaint – Pg. 16)
Breach of Warranty ( <i>Gershzon</i> Complaint – Pg. 17)	
Unjust Enrichment	

While the issues differ slightly, there are still substantial similarities between *Gershzon* and *Hernandez*. *Hernandez* focuses her complaint specifically on the ticket prices and alleged undisclosed fees which were applied at the end of the transaction. (*Hernandez* Complaint ¶ 34) Defendant denies the fees were undisclosed, and the facts pled in *Hernandez's* Complaint undermine such allegations by pleading that the fees were in fact disclosed during the ticket selection process – Pg. 27 of *Hernandez's* Complaint shows the Estimated Subtotal of the two tickets (2 x \$414/ea) and directly below a statement in *italics* reading “(Not including fees)” (*Hernandez* Complaint ¶ 26).

Similarly, *Gershzon* alleges that “Defendant charges consumers *hefty premium prices* for tickets.” (*Gershzon* Complaint ¶ 4) *Gershzon* claims the full price of the ticket was misrepresented to him, and this misrepresentation was something he “relied upon in making his decision to purchase the tickets” and stating that he “would not have bought from Defendant if he had known the truth.” (*Gershzon* Complaint ¶ 17) While *Gershzon* does not explicitly describe this “truth,” the inference based on the allegations is that *Gershzon* refers to the full disclosed price, including fees, and the representation of low inventory for the purchased tickets. *Gershzon* goes on to allege that the “tickets are sold at a *premium price* compared to other similar tickets represented in a non-misleading way and are sold at a price that is higher than the price of the tickets would have been if they were represented in a non-misleading way.” (*Gershzon* Complaint ¶ 38) What *Gershzon* is asserting here are claims of misrepresentation as to the total price of the purchased tickets, including fees, which *Gershzon* claims were not disclosed until the “point of purchase of the tickets.” (*Gershzon* Complaint ¶ 6)



1 Hernandez alleges that Defendant only advertised “part of the products total price to lure  
2 consumers” and “manipulate users into making choices they would not otherwise have made.”  
3 (*Hernandez* Complaint ¶ 12) Hernandez further alleges companies advertise a ticket based on a low  
4 price, but the “consumer ends up paying more because of junk fees that are tacked on the end” –  
5 essentially paying a “premium” price, as Gershzon characterizes it. (*Hernandez* Complaint ¶ 13)


6 As such, the facts support a dismissal or stay of the *Hernandez* action pending resolution of  
7 *Gershzon* because: 1) Gershzon filed his Complaint before Hernandez, 2) Gershzon and Hernandez  
8 purport to represent substantially similar interests through the same putative classes of individuals  
9 and thus have substantially similar identities, and 3) both *Gershzon* and *Hernandez* contain the  
10 same substantive causes of action which substantially overlap regarding “undisclosed” or “hidden”  
11 fees as they relate to Defendant’s advertising efforts and final purchase price of the tickets.

## 12 V. CONCLUSION

13 For the reasons explained above, Defendant respectfully ask this Court to dismiss Plaintiff’s  
14 Complaint against Defendant, or alternatively, stay Plaintiff’s action pending resolution of the  
15 *Gershzon* matter.

16  
17 Date: October 11, 2024

18 STOKES WAGNER, ALC

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